
**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION**

Richard Brewer, Jean Carol Lane, §
And the Texas Division, §
Sons of Confederate Veterans, Inc., §
Plaintiffs, §
v. §
Ron Nirenberg, §
In His Official Capacity as §
Mayor of the City of San Antonio, and § Civil Action No. 5:17-cv-00837-DAE
Roberto Trevino, William Shaw, §
Rebecca Viagran, Rey Saldana, §
Shirley Gonzales, Greg Brockhouse, §
Ana Sandoval, Manny Pelaez, §
John Courage, and Clayton Perry, §
In Their Official Capacities as §
Members of the San Antonio §
City Council, §
Defendants. §

**APPENDIX
to
PLAINTIFFS' FIRST AMENDED COMPLAINT,
MOTION FOR DECLARATORY JUDGMENT, &
MOTION FOR PRELIMINARY INJUNCTION**

/s **KIRK DAVID LYONS**
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THE CONFEDERATE MONUMENT IN TRAVIS PARK
Located in downtown San Antonio, Bexar Co., Texas
Written by Mrs. Fred Oldom of San Antonio, Texas
(Information was taken from the records of BARNARD L. BEE CHAPTER
No. 86, United Daughters of the Confederacy.)

During the summer of 1890.

IN 1890, MARY H. YOUNG organized a Chapter of the
United Daughters of the Confederacy. Charter was granted on October 6, 1895, and
was named BARNARD L. BEE NO. 86 in honor of Brigadier General BARNARD ELLIOTT BEE
who was killed in the Battle of Manassas July 21, 1861. His father, BARNARD E.
BEE, SR. moved to Texas in 1833 after the Texas Revolution, and became Secretary of
State, Republic of Texas. The BEE Family was prominent in San Antonio. Bee County
and city of Beeville were named in honor of the family.

The objects of the United Daughters of the Confederacy were: Memorial, Histori-
cal, Benevolent, Educational and Patriotic.

Charter members under the leadership of their first elected President,
MRS. A. W. HOUSTON, began plans to erect San Antonio's first historical monument.

The Ladies were:

MRS. A. J. ALLENWORTH	MRS. ERNESTINE C. KROEGER	MISS LENORA MITCHELL
MISS ANNIE APPLEWHITE	MISS LAURA A. KROEGER	MISS LAURA MUSSET
MISS MARY DAUGH	MRS. MARY LOUISE HADDOX	MISS MABEL MUSSET
MRS. W. F. BAGCH	MISS ANNA D. MAGRUDER	MRS. I. H. MOSS
MISS EMILY BEAURECARD	MRS. J. B. MAGRUDER	MISS ANNA M. SCHAEFER
MRS. HAMPTON P. BEE	MISS LIZZIE MAGRUDER	MRS. W. C. SILLIMAN
MRS. KATHIE CAMPBELL	MISS MARY E. MAGRUDER	MISS EDNA E. WESCOFT
MISS ALICE LEE KING	MISS MARY MAVERICK	MISS FANNIE E. WESCOFT
MISS MARY KING	MISS SARAH MAVERICK	MRS. E. M. WINSTEAD
	MISS S. J. MAY	

Regular meeting of the City Council, City of San Antonio, met in session Monday,
March 27, 1899. Present were:

MAYOR MARSHALL HICKS	and ALDERMEN:	
ALEXANDER LAMM	O'CONNOR	RICHTER
BARKER MAHNCKE	PIPER	SUBKEY and
DAVIS MURKIE	RHEINER	THIELE

The Council granted permission and gave a perpetual place in Travis Park to
erect the Confederate Monument.

The design was drawn by a distinguished New Orleans artist, MISS VIRGINIA
MONTGOMERY, whose mother was a member of the U.D.C. The stonework was done by
FRANK REICH, material being gray granite from the Llano quarries. Figure of the
soldier with gun at rest and arm raised to Heaven is symbolic of faith in the Lost
Cause, the ivy wreath typifying the Glory of heroic Service.

Three Thousand dollars that financed the Monument was acquired by giving teas,
dinners, musical and dramatic performances. The Corner Stone was laid on June 3,
1899, and unveiled the following April. JUDGE JOHN H. REAGAN, who had been Postmaster
General in the Confederate Cabinet, was guest speaker. Eloquent addressers were also
made by the HON. MARSHALL HICKS, Mayor of San Antonio, and by JUDGE COLUMBUS UPSON,
a veteran of the Confederate Army.

Two cannon flank the site of this monument. They were used in the Battle at
Glorieta Pass, New Mexico, during the War Between the States (1861-1865). At the end
of the war, they were kept buried; after it was safe they were unearthed by MAJOR
TREVOR T. TEEL, Commander of TEEL'S Battery. MAJ. TEEL was grandfather of
MRS. J. R. HENNING of San Antonio. They were brought to Texas and donated to be
placed in Travis Park by MAJ. TEEL.

From the Telegraph and Texas Register, Aug. 18, 1898:

ESTRAY NOTICE. Taken up by DAVID RADON and appraised before W.L. WALKER, J.P., a black coan
horse six years old, 16½ hands high, star in the forehead, left hind foot white, valued at \$175.00.
Fort Bend County, August 5.

JOSEPH H. BARNARD, County Clerk

Confederal, Benevolent, Educational and Patriotic.

Charter members under the leadership of their first elected President, A. W. HOUSTON, began plans to erect San Antonio's first historical monument.

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MISS FANNIE APPLEWHITE	MISS LAURA A. KROEGER	MISS LAURA MUSSEY
MISS MAE BAUGH	MISS MARY LOUISE MADDOX	MISS MABEL MUSSEY
MRS. W. P. BAUGH	MISS ANNA D. MAGRUDER	MRS. L. H. MOSS
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MRS. KATIE CAMPBELL	MISS MARY E. MAGRUDER	MISS EMMA E. WESCOTT
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Copies of Minutes of
Albert Sydney Johnston Camp 144
United Confederate Veterans
San Antonio, Texas

1893 - 1926

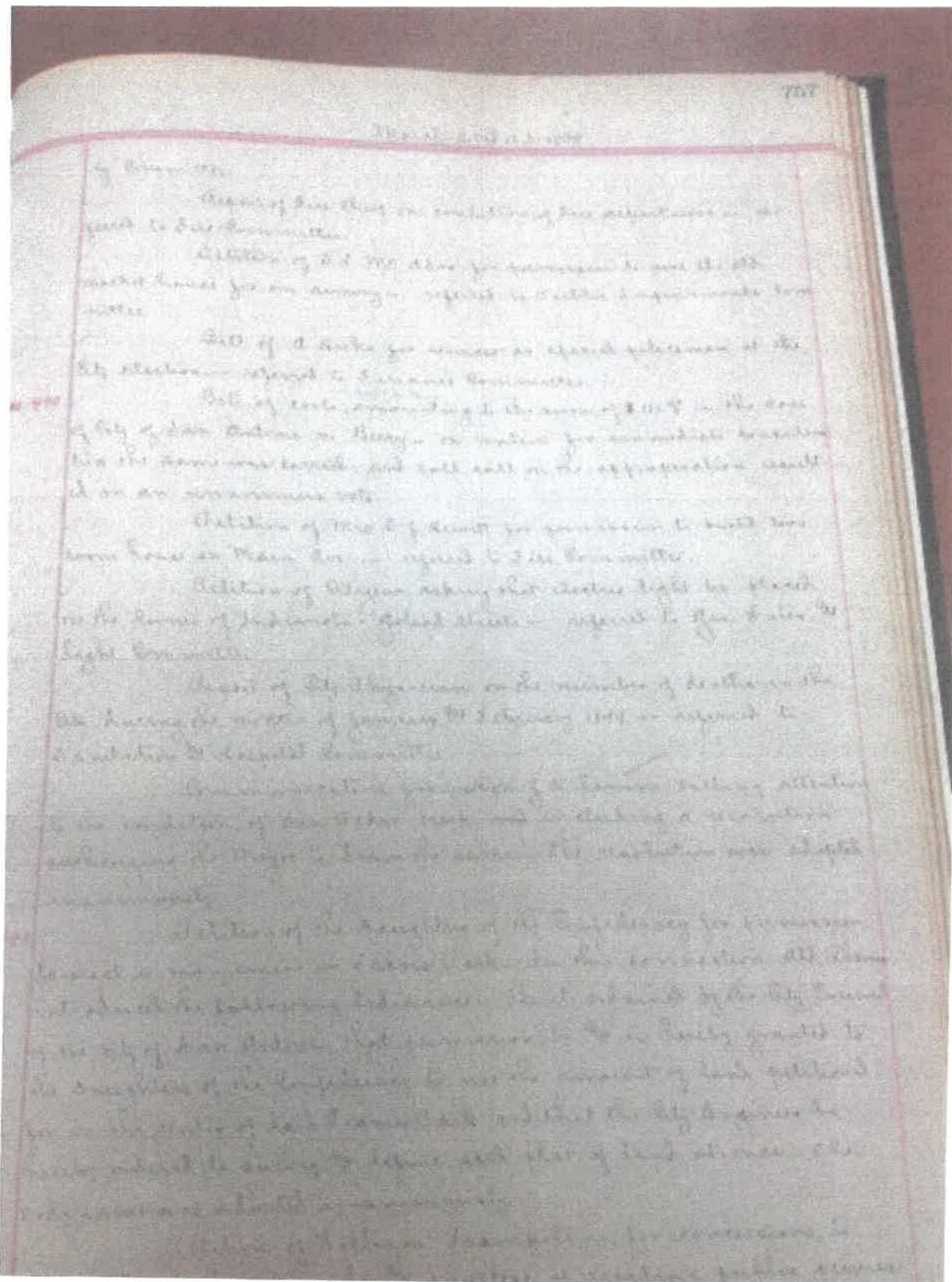
Major Warner D. Farr, M.D.
Noralyn Ann Page
Jane Alberthal
Dena Brown
*...for their enduring devotion to
the preservation of historical documents.*

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Jane Alberthal
U.D.C. Museum Committee
2115 Leal
San Antonio, Tx. 78207-2040

Belong to Bob & Dena Brown

Illustration of the development of the body of *Acanthococcus* from the hatched instar onwards. The hatched instar is the same as the first nymphal instar of *Pseudococcidae*. The following table gives the approximate dimensions of the body of an *Acanthococcus* at different stages of its development. It shows that the body of an *Acanthococcus* increases in size very rapidly during the first two nymphal instars, and then more slowly.



610

on expense account to Birmingham re-union - Granted
Com. Sloan reported that \$200⁰⁰ had been paid to him
by Arnold - Trustee of the Estate of Lisselius
in conformity with a will made by said Lisselius
deceased to Albert Sidney Johnston Camp #144 U.C.V.
Com. - Vacancies having occurred thru' resigna-
tions of Comrades Long & Raveler - R. F. Alexander
& J. E. Fitzgerald were appointed by the Capt. to
fill the unexpired terms of said Comrades

14th July

It was decided to have a basket pic-nic on the
4th of July at West End Pavilion & the Dog Run
invited to join in same. Kroeger was appointed
Chairman & chose for his Assistants, Tanning, Col-
loman & Barker.

Honorary

Members - Mrs. J. D. Quinn & Prof. Wesley Peacock were
elected Honorary Members of the Camp.

There being no further business before the Camp
adjournment was made until 1st Sunday in July

V. J. Peterson

(Adj't)

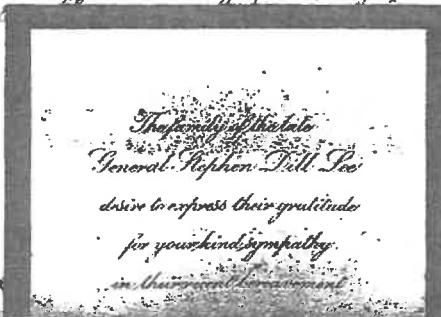
F. T. Collins capt

Headquarters Albert Sidney Johnston Camp #144 U.C.V.
San Antonio, Tex. July 5th 1908

Camp met in regular session at Kunkle's Hall, 10th
A. F. Collins presiding.

Captain Long officiated as Chaplain, invoking the
blessing of the deity on all present & absent.

Communication from the family of the late General
Stephen W.



7

Communication from Miss Anna Estelle - Long - concerning
funds on hand or the amount necessary to make
out of \$2500 to expenses to Birmingham re-union
was sent & order filed.

Communication from H. P. Shaw Adj't Gen'l & Chief of
Staff, notifying Camp of the State re-union, to be
held at Hills Point, D.C. was received & ordered filed.
At this stage a thunder storm coming up, Capt.
Collins vacated the Chair to Lt. Denny to hasten
home, stating his wife was very nervous whenever
a storm was brewing & if he could get to her side
to reassure her always did so.

vacation of S. S. Camp was referred to Comrades Tom Smith,
Reynolds & Baker.

Prs. Gravis was reported sick, having suffered
a paralytic stroke & Lt. Denny was requested to
render such assistance as he deemed necessary.

W. H. W. Greenmore paid \$500

Comrade Sloan moved that G. F. Collins resignation
as Captain of the Camp be laid over to next meeting
reconsider & carried.

Communication from the Mayor of the City - Hon.
Bryam Callaghan - notifying Camp that he had
accepted two flags from Lt. Col. Chas. N. (Capt.
H. S.) H. which had been presented to the City of
San Antonio, Tex. by the U. S. Congress, for the ben-
efit of the Confederate Camp of this City, was received
and ordered that Lt. Denny confer with New Haven
as to the disposition of same.

It was the concensus of the Camp, that the ceremony
attending the acceptance & placing of same, one on
each side of the Confederate Veterans monument at
Travis Park be left to W. H. J. D. Quinn Dush of D. C.
Denny was also appointed to make arrangements.



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1

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 SAN ANTONIO DIVISION

4 RICHARD BREWER, ET AL, :
5 Plaintiffs, :
6 :
7 vs. : No. SA:17-CV-00837
8 : San Antonio, Texas
9 RON NIRENBERG, ET AL, : August 31, 2017
10 Defendants. :
11 *****

12 TRANSCRIPT OF MOTION HEARING
13 BEFORE THE HONORABLE DAVID A. EZRA
14 SENIOR UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

16 FOR THE PLAINTIFFS:
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22 FOR THE DEFENDANTS:

23 Deborah Lynn Klein, Esq.
24 Office of City Attorney
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deborah.klein@sanantonio.gov

26 COURT REPORTER:

27 Angela M. Hailey, CSR, CRR, RPR
28 Official Court Reporter, U.S.D.C.
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31 angela_hailey@txwd.uscourts.gov

32
33 Proceedings reported by stenotype, transcript produced by
34 computer-aided transcription.

11

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2

1 (1:58 p.m.)

2 COURTROOM DEPUTY: SA:17-CV-837, Richard Brewer
3 versus Ron Nirenberg, et al.

4 THE COURT: All right, good afternoon. Can I have
5 appearances please?

6 MR. CHAPMAN: Good afternoon, Your Honor. I'm
7 James Chapman appearing on behalf of Kirk Lyons who I
8 believe the court has permitted to also appear by
9 telephone.

10 THE COURT: Yes.

11 MR. LYONS: Mr. Lyons is present by telephone, if
12 y'all can hear me.

13 THE COURT: We can hear you, Mr. Lyons. Can you
14 hear me?

15 MR. LYONS: Thank you. Yes, sir.

16 MS. KLEIN: Debbie Klein and Shawn Fitzpatrick.
17 Just for the record, we have not actually been served
18 at this point, but we did want to be heard on the
19 temporary restraining order.

20 THE COURT: Okay. All right, Mr. Lyons, are you
21 going to be making the argument?

22 MR. LYONS: I can begin if I can be heard. This
23 was filed, Your Honor, may it please this honorable
24 court, we filed this action just before the court
25 closed last night because we had information that the

1 City of San Antonio was going to vote and take down the
2 117-year-old confederate monument at Travis Park. We
3 believe that we have met the elements for a temporary
4 restraining order. I did enjoy reading the City's
5 brief response. It's a great motion to dismiss motion,
6 it's a 12(b)6, but there wasn't very much temporary
7 restraining order there, save that likelihood of
8 success on the merits they put in doubt. The case is
9 in Federal Court on a Federal question. We are
10 obviously going to have to amend our complaint, we had
11 to do this very hurriedly and rushed and we have, you
12 know, we have time to do that since they have not
13 answered to properly amend it and clean it up, but
14 what's on issue here is the irreparable harm that will
15 be done if the City of San Antonio is allowed to take
16 down this 117-year-old monument probably tonight.
17 While we are trying to wrestle these issues in Federal
18 Court. We have a case very similar to this in Austin
19 in the Western District of Texas, Austin Court, where
20 we have sued the University of Texas. One of the
21 plaintiffs is the same in that case, Texas Division
22 Sons of Confederate Veterans. The case was filed less
23 than a week -- a little over a week ago and just
24 yesterday we issued a joint advisory with the
25 University of Texas and the plaintiffs with the court

1 there in Austin which would allow essentially the
2 maintenance of a status quo while these issues --
3 especially if the 12(b)6 level are being pled and
4 argued. That agreement was just signed yesterday and I
5 would be happy to make a copy of that available to the
6 court and opposing counsel, of course.

7 THE COURT: All right. Just a minute,

8 Mr. Lyons --

9 MR. LYONS: We have a similar situation here in
10 that where we're facing irreparable injury, there's
11 always a possibility that the monument could be
12 damaged. Once it's down makes it that much harder to
13 put back up and there's no -- we don't see that there
14 is a burden on the City whether they take it down
15 tonight or at the end of the 12(b)6 period if they
16 should prevail. We certainly think it's in the public
17 interest. Monuments are coming down all over the
18 nation. We do have a Federal question, we think that
19 we can hold on to that Federal question that it's
20 appropriate, the First Amendment problems that we see
21 with the City of San Antonio mandating what this
22 statute stands for and why it should come down. We
23 have cited the Barnes case of Supreme Court in Texas v.
24 Johnson regarding political speech of political bodies
25 in this context and we certainly think that we can

1 distinguish this case from the recent Walker versus
2 Texas SCV case. Again that's more appropriate for the
3 12(b)6 level of this case and not the temporary
4 restraining order.

5 The likelihood of success on the merits, I
6 think that we have a fair shot at it, Your Honor.
7 There is of course the City has alleged a standing
8 problem which again is more proper to the 12(b)6 part
9 of this case. The Supreme Court of Texas is probably
10 fixing to rule on that very issue within the next
11 couple of weeks on the standing issue, but we certainly
12 again we do need to beef up the standing that we have
13 alleged in the complaint and we have the right to do
14 that. That analysis is not appropriate at the TRO
15 level and what we allege is irreparable injury if that
16 monument comes down tonight before we had a chance for
17 our arguments to be properly read and heard. It's
18 certainly in the public interest. We believe that
19 there is a likelihood that we can prevail on the merits
20 and certainly we do not think this puts an undue burden
21 on the City to wait until the judicial process can wind
22 its way. It won't be that long. If they're confident
23 that they can win at the 12(b)6 level and dismiss this
24 claim, you know, we're only going to be talking a
25 matter of weeks or just a couple of months before the

1 end of that process and so, Your Honor, we on behalf of
2 the plaintiffs and other similar situated, this
3 monument needs to stay here for the time being.

4 THE COURT: All right. Thank you very much,
5 Mr. Lyons.

6 MS. KLEIN: May I respond, Your Honor?

7 THE COURT: Yes. That's why you're here.

8 MS. KLEIN: First and foremost, Your Honor, we
9 would point out that while the plaintiffs have filed an
10 application for injunctive relief, they don't have any
11 request within their pleadings for final relief in this
12 case which in itself makes their entire suit infirm.

13 Beyond that, Mr. Lyons has indicated that our response
14 is more of a 12(b)6 motion, but in fact, as a basic
15 tenet of entering a temporary restraining order which
16 is an extraordinary relief, there are four elements
17 that it is plaintiff's burden of proof, it's not our
18 burden to disprove, although I think we've done that.

19 And the first of those is the likelihood of success on
20 the merits. And if, in fact, what we've established is
21 a good 12(b)6 motion, that is establishing that there's
22 not a likelihood of success on the merits for the
23 plaintiff. And I think it's important to note that as
24 those steps, those elements of a TRO are set fourth and
25 I'll refer the court specifically to Clark versus

1 Prichard out of the Fifth Circuit which is 812 F2d 991,
2 it's not just a likelihood, it's a substantial
3 likelihood of success on the merits. And I would like
4 if it's okay with the court to go through some of the
5 elements that I've established through our response
6 already and may be a bit repetitive of what's been
7 filed, but I'd like to elaborate on some of them, if I
8 may.

9 THE COURT: All right.

10 MS. KLEIN: So first of all, there is a standing
11 question which Mr. Lyons has made light of in this
12 case. However, standing is jurisdictional. If they
13 don't have standing, the court doesn't have
14 jurisdiction over the case and we do not believe there
15 is standing in this case. The plaintiffs have failed
16 to identify a single injury that is personal to them
17 which is an essential element of standing. It's not
18 sufficient to just say I'm injured to the same extent
19 as the public at large. They have to show a personal
20 injury to themselves. Mr. Lyons indicated that he
21 expected some sort of ruling from the Supreme Court on
22 this issue in the future. Well, the Texas Supreme
23 Court has spoken to this already. And they've said
24 exactly that, that just merely being a taxpayer and
25 suffering the same supposed harm as the general public

1 is not sufficient.

2 THE COURT: I'm aware of that. The fact of the
3 matter is that this court doesn't judge Federal
4 constitutional claims predicated on the decisions of
5 State Supreme Courts. I look to Federal law, not State
6 law. State law may be instructive, but it is not
7 controlling.

8 MS. KLEIN: I understand, Your Honor, and so I'd
9 also reference the court to Flast versus Cohen, 392
10 U.S. 83, which is establishes that there is not a
11 qualification for taxpayer standing except in very
12 limited circumstances which relate to establishment
13 clause lawsuit which this is not. The reason I cited
14 to the State law as well is because in the cases in the
15 Federal system that I was able to find this morning,
16 they all go to the expenditure of Federal funds and so
17 that's why just for the court's edification I also
18 wanted to reference the State law as well and what the
19 State's position has been on taxpayers.

20 We also have taken the position that the
21 parties that have been sued in this case are not the
22 proper parties to the suit. The plaintiffs have filed
23 suit against each of the council members, not the City
24 of San Antonio. The City Council is voting on the
25 agenda item today and once that item is passed, their

1 roles and responsibilities with respect to it are
2 essentially completed and it goes to the City to follow
3 through on the actions that they have set forth.

4 THE COURT: Well, they sued the Mayor.

5 MS. KLEIN: They did sue the Mayor, Your Honor.
6 But as a matter of record, we set forth that they did
7 not file the suit against the proper parties. More
8 importantly, though, let's get to the actual causes of
9 action which they pled which are three. The first one
10 is this claim that the City doesn't actually own the
11 property at issue. Their own pleadings dispel this
12 argument that they have made. They concede in their
13 pleadings that in the 18 -- I believe it's the 1880s,
14 Mary Maverick, who was the owner of the property,
15 previously conveyed and recorded a conveyance of the
16 property to the City. The City has held that property
17 uncontested except for one contest that we could find
18 since that time and that contest occurred in the 1950s
19 when the City was going to build an underground parking
20 garage in additional property that's next to the park.
21 And the court -- again it is in State Court, but the
22 court did judicially recognize the City's ownership of
23 that property. And --

24 THE COURT: Well, that, the court takes cognizance
25 of because that's a question of State law, who owns a

1 particular parcel of property or a building or a
2 monument would be determined generally, unless it's a
3 Federal parcel, by State law. That's not what we're
4 talking about. What I was talking about when I said we
5 don't judge Federal constitutional claims by rulings of
6 State Court on things like free speech and those --
7 because we have Federal law we look to. In fact, the
8 Supreme Court of Texas, when judging a Federal
9 constitutional claim, is compelled to look to Federal
10 law as well.

11 MS. KLEIN: And we believe the Federal law
12 supports our position in this case. Going also along
13 the question of the ownership of the property, the
14 plaintiffs have not pled any allegation that they have
15 a property interest in that property. They have no
16 standing to claim we don't own the property because
17 there's been no allegation that any plaintiff is
18 actually entitled to ownership of the property. This
19 should have -- if it could be brought as a suit which
20 we don't believe it should, it's essentially a trespass
21 to try title suit and we believe that the allegations
22 as pled support the City owns the property.

23 They've also made an allegation of adverse
24 possession that -- and I may be getting their argument
25 wrong, but as I read their case, what they're

1 contending is that because the statue was placed on the
2 property in the 1890s and we did not record a deed
3 within 25 years, that that property has now become the
4 property of some other entity, not the plaintiffs,
5 through adverse possession. And again I do rely on
6 State law for this proposition, but under the Texas
7 Civil Practice and Remedies Code, Section 16.061a,
8 Limitations do not apply against the interest of
9 government entity in the State of Texas. So there is
10 no adverse possession that can be asserted against the
11 City of San Antonio.

12 Additionally under 16.030, it specifically
13 says that you cannot take adverse possession of
14 property -- a person may not -- of property that is
15 held for public use, such as a park. So based on that,
16 their adverse possession arguments are without merit
17 and they are not likely to be successful on that.
18 They've also alleged this concept of estoppel -- I'm
19 going to butcher this, but I believe it's pronounced in
20 pais. And the theory is that because the statue was
21 placed there and we haven't done anything about it,
22 that essentially it's an easement and we can't do
23 anything about it. Again I rely on State law for this
24 concept of estoppel. The states anyway have
25 established that there is no estoppel against a

1 government for enjoying its government functions and in
2 this particular case the operation of a park is deemed
3 to be a government function and we don't believe that
4 estoppel is appropriate. We don't believe there's been
5 facts alleged. And again this comes back to the
6 standing issue, I haven't seen any allegation that any
7 of the plaintiffs have a property interest in the
8 property that the statue is on and so based on that, we
9 don't believe they can be successful on that at the end
10 of the day.

11 The third claim is this claim that there is
12 an abridgment of their freedom of speech and of the due
13 process. On the freedom of speech, the U.S. Supreme
14 Court has clearly spoken through the decision of
15 Pleasant Grove, City of Pleasant Grove versus Summum,
16 not sure how to pronounce that. And in that, they
17 recognize the concept of government speech and
18 specifically discuss the fact that monuments and parks
19 are aspects of government speech. And so, therefore,
20 the scrutiny of a First Amendment claim is not truly
21 applicable to these challenges and that governments
22 control and have final authority over what speech is
23 displayed in their parks, assuming use of permanent
24 monuments. Whether those monuments are placed there by
25 the City or whether they give permission to someone

1 else to place it, it turns into the government's speech
2 because it is associated with the government's property
3 which is the park. The Supreme Court in that case
4 clearly said that the government gets to make a
5 decision what speech they choose to express. And the
6 mere fact that a hundred years or more ago the then
7 reigning or the then installed Council -- poor choice
8 of words, Your Honor -- the installed City Council at
9 the time felt that was a government speech they were
10 comfortable with. The current City Council, duly
11 elected by the public, does not agree with them.

12 THE COURT: Have they actually voted yet?

13 MS. KLEIN: The vote was going on this afternoon.
14 It passed.

15 THE COURT: So there is an actual vote to remove
16 the statue.

17 MS. KLEIN: There is an ordinance in place.

18 THE COURT: So we do have a case or controversy
19 because if there had been no vote, if they hadn't
20 voted, if there hadn't been anything to challenge, we
21 wouldn't have a case or controversy and as you know in
22 Federal Court, the very first thing that I need to have
23 before I have jurisdiction, because this is a court of
24 limited jurisdiction, is a case or controversy, so now
25 we have a case or controversy.

1 MS. KLEIN: Thank you, Your Honor. Plaintiffs
2 have not alleged any specific free speech violation
3 that would go to them as the plaintiffs. I believe
4 there's a pleading to the effect that the monument's
5 free speech is being abridged, but the monument doesn't
6 hold free speech. To the extent that they're
7 contending the monument was put up by the Daughters of
8 Confederacy, they're not a party to this lawsuit. The
9 plaintiffs -- again it wouldn't matter anyway because
10 the monument at this point is considered to be
11 government free speech or should be considered to be
12 government free speech. There is nothing that the
13 plaintiffs have alleged nor is there any evidence I
14 believe that they will be prohibited from exercising
15 their free speech rights as they're entitled to under
16 the law and in a public forum, but this particular
17 statue is not their expression of free speech, so
18 therefore, there's no likelihood they would succeed on
19 the merits of a free speech claim.

20 Their final claim is abridgment of a due
21 process. Again the first question in looking at a due
22 process claim is what is the property or liberty
23 interest which they are claiming they've been deprived
24 of. There's not one. They have not established any
25 property interest in the monument itself or in the park

1 property that they own as the plaintiffs. They have
2 tried to assert this freedom of speech, but as I've
3 just addressed the court, that is not actually anything
4 that's being abridged. So based on that and based also
5 on the fact that we have gone through the process,
6 there has been an open meeting, there has been an
7 opportunity for people to speak and the legislative
8 body has taken the vote that it has, there has been
9 appropriate due process for proceeding with the
10 decision to remove the statue as government speech.

11 The second element of a preliminary
12 injunction is the concept of irreparable harm and we do
13 not believe that there's been a sufficient pleading of
14 irreparable harm in this case. The City represents
15 that the statue is not being destroyed. It is being
16 removed, it will be stored. If at the end of the day
17 the court should rule in favor of the plaintiffs on
18 this case, it can be replaced if the court so orders.
19 If there was damage to it, the City could be ordered to
20 repair any damage or to properly place an equal statue
21 back on the pedestal or back on the place where it's
22 currently located. So we do not believe that there is
23 irreparable harm in this case to justify the issuance
24 of a temporary restraining order.

25 The third element is a question of where is

1 the greater injury in granting it or denying it. We
2 don't believe the plaintiffs have established any
3 injury on their part as we said at the very beginning
4 because they failed to establish any sort of property
5 or liberty interest which is being violated. We do
6 feel that if the TRO is granted, that there is a harm
7 to the City, it's to the City at large through both the
8 electoral process and the decisions made by the
9 community of the City of San Antonio to elect people to
10 the City Council to act on their behalf as well as to
11 the legislative process to make determinances to what's
12 in the best interest of the City.

13 And finally, the last one is whether or not
14 granting the TRO will disserve the public and the City
15 does feel strongly that granting this TRO will disserve
16 the public. Mr. Lyons has stated as I think everyone
17 in this courtroom is well aware throughout the country
18 the issue of removal of these statues has been at the
19 forefront, it's all over the newspapers and we believe
20 that one day longer with the statue in place is one day
21 more of disservice to the public at large. And so
22 based on that, we would ask that the court deny the
23 temporary restraining order. We don't believe they've
24 met any of their burdens and in fact if we've been able
25 to establish that even one of their elements is not

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1 established, the TRO cannot go forward. I also just
2 for the record would like to reiterate as in our
3 response, we've objected to the affidavit of Mr. Lyons.
4 The only I guess evidence attached to his application
5 is his own affidavit which states that he's read
6 newspaper articles and talked to people. He has no
7 indication that any of the information contained within
8 the petition is true and correct based on anyone's
9 personal knowledge. And so based on that, we don't
10 believe the temporary restraining order motion is
11 properly supported. Does the court have any questions?

12 THE COURT: I do not.

13 MS. KLEIN: Thank you, Your Honor.

14 THE COURT: Mr. Lyons, I'll give you a moment for
15 short rebuttal argument if you'd like.

16 MR. LYONS: Yes, Your Honor, briefly. One, as is
17 clear in our complaint, all of the defendants are
18 served in their official capacity which is essentially
19 makes it a suit against the City of San Antonio. No
20 one is sued in their individual capacity. I think that
21 was properly done.

22 Secondly, with all the monuments coming down
23 around the country, we have seen several instances
24 where government taking down monuments have botched it.
25 They have broken the monument, destroyed them and it's

1 been badly done. And any time that you take down a
2 117-year-old monument, you're going to have problems if
3 it's not done by experts. The taxpayers of San Antonio
4 are -- two of our plaintiffs are taxpayer citizens of
5 San Antonio have an interest in their money not being
6 wasted, that this not be done twice if we should
7 prevail. Our position is very reasonable, Judge, we're
8 just asking for the status quo. While we push this
9 through the court, all of San Antonio's wonderful
10 12(b)6 arguments can then be properly pled and
11 researched and we can respond and we can take our time
12 and set up a preliminary injunction hearing where both
13 sides can more fully brief their positions, but the
14 12(b)6 standard does not apply here, Your Honor, and
15 anything that we have the right to fix anything that
16 San Antonio has very kindly pointed out for us if we
17 think it needs fixing, but right now we are facing
18 irreparable injury, it is in the public interest that
19 this monument be protected for now until these issues
20 are all brought out. There is the pending jurisdiction
21 of the court to hear the State claims attached to the
22 Federal claims as long as they're related, so it's just
23 like what we did in Austin, Judge, give us the time to
24 pull the West Law out and get to work on this and
25 properly bring this through pleadings in the court

1 whether it be preliminary injunction hearing which we
2 can set at all parties' and the court's convenience or
3 a 12(b)6 motion which this is not the proper place to
4 argue, Your Honor.

5 THE COURT: My understanding is at the University
6 of Texas a number of statues were, in fact, removed.

7 MR. LYONS: Yes, Your Honor, that's true. We did
8 not respond in time, but we -- our lawsuit was
9 regarding the pedestals or plinths that remained.

10 THE COURT: The statues are gone.

11 MR. LYONS: Statues are gone. They're in storage
12 at the -- we didn't get there in time for that
13 because --

14 THE COURT: I think what we need --

15 MR. LYONS: The pedestals which they were going to
16 remove are being left by agreement. That's what the
17 agreement covered is the plinths or pedestals that were
18 left that our information was were going to be removed.
19 That's what the status quo is, Your Honor.

20 THE COURT: All right. Okay. I just want to make
21 it clear that there was no Federal judge in Austin that
22 issued a temporary restraining order or preliminary
23 injunction. That didn't happen.

24 MR. LYONS: No, that is correct, Your Honor. No,
25 it was a joint advisory to the court by agreement.

1 THE COURT: And it didn't actually have anything
2 to do with the statute themselves, it just had to do
3 with the bases of them.

4 MR. LYONS: The pedestals, yes, Your Honor, that's
5 correct.

6 MR. CHAPMAN: Your Honor, would the court allow me
7 to make --

8 THE COURT: No, sir. We have counsel here. He's
9 already argued on behalf of the parties. We can't --
10 this is not a tag team match here.

11 MR. CHAPMAN: Thank you, Your Honor.

12 THE COURT: So you have competent counsel. I've
13 given him plenty of opportunity to argue.

14 First of all, I think the court needs to make
15 it very clear that my scope of consideration here has
16 to do with some very complicated issues of Federal law
17 having to do with constitution and having to do with
18 jurisdiction. There is nothing in my charge here,
19 nothing, that gives me either the right or gives me the
20 authority to make an independent determination as to
21 whether or not it is a good thing or a bad thing to
22 have the statue of William Travis in the park. That is
23 not my job, it is not my authority, I have no right to
24 do that and I have no intention of doing that. That is
25 a function of a governmental body elected by the people

1 of the City of San Antonio, not a United States
2 District Judge appointed by President Reagan in 1988.
3 My job is to determine whether there is a free speech
4 violation here, whether the plaintiffs have standing to
5 assert their claim and that is it. So I want to make
6 it very clear here because unfortunately there is
7 always these misunderstandings. When Federal judges
8 who have limited jurisdiction make these decisions,
9 they're often misunderstood as being a decision on the
10 merits of a particular action taken by someone rather
11 than whether or not there is a Federal cause of action
12 that exists under the law and that is what my charge is
13 here. And I think that's very very important to
14 understand. Now, let me make it clear that I do not,
15 as I sit here today, I do not understand that it's the
16 City's present intention to destroy the statue. Am I
17 correct?

18 MS. KLEIN: That is correct, Your Honor, and we've
19 actually hired a company that's an expert in removal of
20 these sorts of statues.

21 THE COURT: So it's my understanding that what the
22 City intends to do is at some point remove the statue
23 and then -- intact, and then place it somewhere in
24 storage until the City finds another appropriate place
25 to house it. Am I correct?

1 MS. KLEIN: That is correct, Your Honor.

2 THE COURT: Am I understanding that correctly?

3 MS. KLEIN: That is correct, Your Honor.

4 THE COURT: Now, of course, if the plaintiffs were
5 to prevail in their lawsuit, then the statue, if it was
6 removed, would have to be replaced. So the point is
7 that the statue has to remain intact.

8 MS. KLEIN: Yes, Your Honor.

9 THE COURT: Right?

10 MS. KLEIN: Yes.

11 THE COURT: So we understand that. And that isn't
12 always the case. I mean I've seen other cases where
13 governmental bodies come in with a wrecking ball -- not
14 necessarily statue cases, but with historic properties
15 and so forth and the desire is to get rid of it and the
16 cheapest and easiest way to do that is to demolish it
17 and just have the remnants carted away and then someone
18 comes along and says, wait a minute, this is a historic
19 property, you can't do that, and then we have a Federal
20 lawsuit.

21 MS. KLEIN: That's correct. That is not the
22 intent here, Your Honor. The intent is to remove it in
23 full -- I don't know what the proper term is, but
24 intact.

25 THE COURT: Intact is the proper term.

1 MS. KLEIN: Intact, keep it in storage.

2 THE COURT: All right. Well, the parties have
3 raised a number of issues here. I'm not going to make
4 a ruling from the bench. I think that's not
5 appropriate, but I do understand the importance of
6 getting a ruling out quickly. It is my general
7 practice in a case such as this, and I've been doing
8 this for a long time, to issue a written ruling. And I
9 do that for two reasons. First of all, I do it so that
10 the parties have something in hand that explains
11 precisely what the court did and more importantly the
12 parties are entitled to know why I did it and the legal
13 basis for my ruling rather than the court just simply
14 saying I'm going to do this or that. That's important.
15 Secondly, it also provides the parties a document by
16 which if they choose to do so, they can seek an
17 emergency appeal to the Fifth Circuit Court of Appeals
18 which is much more difficult to do if all you have is
19 an oral ruling, right? And I believe in the appellate
20 process, I always have. I'm not saying that people are
21 going to appeal what I do. I do pretty good on appeal,
22 I understand, but the fact of the matter is I sit by
23 designation I have sat for over 27 years on the Ninth
24 Circuit Court of Appeals, I do it two or three times a
25 year, so I believe in the appellate process. So if you

1 want to appeal what I do, I have every intent of
2 providing the parties with the document by which they
3 can do that, okay. I will try to get an order out
4 by -- it's 2:30. I will try to get an order out today
5 by 4:00. My understanding is that nothing is going to
6 take place before 5:00, is that what we were told?

7 MS. KLEIN: That's correct, Your Honor.

8 THE COURT: All right. Now, I would urge all
9 concerned to exercise a degree of contemplative
10 restraint regardless of what this court does, okay.
11 This is not the end of this case regardless of whether
12 I grant or deny the motion. People have very strong
13 feelings about these issues and I understand and
14 appreciate that, I do. But a resort to individual
15 action in a way that would cause disruption or worse is
16 not the right way to vindicate one's rights in a
17 situation like this. It just isn't productive. It
18 doesn't work, it backfires virtually every time it's
19 done and tends to validate the arguments made by the
20 opposing side, so I would certainly urge all to be
21 calm, let the process run its course. Regardless of
22 what I do today, there will be a further motion in this
23 case down the road. This is not a motion to dismiss
24 the case. This is simply a motion to seek a
25 restraining order on the City's removal of the statue

1 to another place where the statue would be preserved.
2 It is not a request by the City to destroy the statue.
3 That's important to understand. So I will take the
4 matter under advisement and as I said I'm going to try
5 to get an order out in writing between four and 4:30
6 this afternoon. Okay. Thank you very much for your
7 arguments. Thank you, Mr. Lyons.

8 MR. LYONS: Thank you, Your Honor.

9 THE COURT: Court stands in recess.

10 COURT SECURITY OFFICER: All rise.

11 (2:34 p.m.)

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2 UNITED STATES DISTRICT COURT

3 WESTERN DISTRICT OF TEXAS

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5 I certify that the foregoing is a correct transcript
6 from the record of proceedings in the above-entitled matter.
7 I further certify that the transcript fees and format comply
8 with those prescribed by the Court and the Judicial
9 Conference of the United States.

10

11 Date signed: September 13, 2017

12

13 /s/ Angela M. Hailey

14 -----
15 Angela M. Hailey, CSR, CRR, RPR
Official Court Reporter
655 East Cesar E. Chavez Blvd.
Third Floor
San Antonio, Texas 78206
(210) 244-5048

AFFIDAVIT

My name is John McCommon; I am over the age of eighteen and am capable of providing this statement and affidavit.

I am providing this statement and affidavit of my own personal knowledge, freely and willingly, as part of a lawsuit filed by the Texas Division, Sons of Confederate Veterans.

I serve as Lieutenant Commander of the Texas Division of the Sons of Confederate Veterans. During my 15 years with the Sons of Confederate Veterans, it has been a privilege to honor the legacy of Confederate Veterans. We provide educational programs and awards to JROTC students. We enhance civic functions throughout the United States through historical reenactments, participation in parades and festivals, maintain veteran's graves, and also by providing relief to those affected by natural disasters.

The SCV performs outreach to the community through programs about the Civil War to local schools and provide men and women dressed in period uniforms for various civic functions in San Antonio. I have been a member for 15 years. When not in the SCV, I am a retired account executive and live in Boerne, TX.

In addition, I am President of the Confederate Cemetery Association of San Antonio. Our mission is to protect the graves of the Confederate Veterans and their families in our privately owned cemetery in San Antonio, TX.

I was disappointed to see the Confederate Monument in Travis Park come down and as I drove by Travis Park and saw where the City workers jack hammered the base of the monument and became alarmed. The base of the monument was designed and constructed of carved granite blocks. They were laid by the well-known sculptor, Frank Teich in 1899. Those granite blocks are valuable and cannot be replaced without being individually carved.

I was very concerned about the jack hammering. The base contained a time Capsule that contained the names of the ladies who raised the funds for the monument in the late 1890's. They held bake sales, quilting bees,

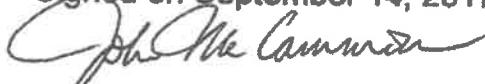
and teas to raise a few dollars at a time. By using those jack hammers, I fear they may have destroyed that time capsule as described in the newspaper and the roster of the members who raised those funds – along with the contents in that time capsule. The base of the monument was a critical part of the statue. I did not see the need to employ jack hammers. I was also surprised that the City of San Antonio started removing that monument without informing the Confederate Cemetery Association after saying in the paper that they would consider a panel to determine the disposition of the monument. I attended the last public opportunity to speak about the preservation of the monument at city hall. The mayor shook my hand and said that as a member of the SCV and President of the Confederate Cemetery Association that my input would be considered in the removal of the statue. The Confederate Cemetery is available as I told the mayor that night. I was never contacted again and the monument was taken down and covered with dirt and shrubs placed over where the statue stood.

I attended the hearing in the Federal Court where Senior Federal Judge, the honorable David Ezra, asked specifically of the city attorney if the statue was to be removed intact. This was confirmed by the city attorney that the statue would be removed intact.

"I declare under penalty of perjury that the above statement is true and correct. I have been given an opportunity to review this statement and to make any necessary changes."

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Signed on September 14, 2017.

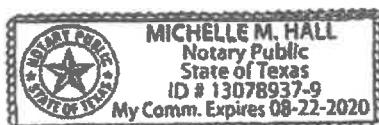


John McCammon
Lt-Cdr, Texas Division
Sons of Confederate Veterans

State of TEXAS County of KENDALL

Before me today personally appeared JOHN FRANKLIN MCCAMMON JR

On 15 Day of SEPT 2017







Law Office of
THOMAS J. CRANE
110 Broadway, Ste 420
San Antonio, Texas 78205
210-736-1110
210-745-4258 (Fax)

27 September 2017

Deborah Lynne Klein
Office of the City Attorney
111 Soledad, 10th Floor
San Antonio, Texas 78205

Re: *Brewer v. Nirenberg*/ Cause No. 17-CV-00837-DAE

Dear Ms. Klein,

I have left you telephone messages on Sept. 20 and 27. We also sent you letters dated Sept. 18 and 19. But, we have not heard back from your office. The Sons of Confederate Veterans would like to see the statue that was formerly in Travis Park and assess its condition. We would also like to know the status of the time capsule that was placed under the foundation in 1899.

Sincerely yours,

A handwritten signature in black ink that reads "Thomas J. Crane".

Thomas J. Crane

cc John McCammon
David Vandenberg